

In addition, at oral argument to the Board, the parties were advised they had failed to attach the work status reports to the Stipulation Admitting Work Status Records filed with the Division of Workers Compensation on January 20, 2009. Accordingly, the parties

agreed to provide those reports to the Board. As of the date of this Order, the work status reports have not been provided to the Board.

ISSUES

This is a claim for a July 10, 2001, accident and resulting injuries. In the April 9, 2009, Award, Judge Klein awarded claimant permanent partial disability benefits based upon a 79.5 percent whole person functional impairment.¹ The Judge stated, in part:

The Court further finds that though the Claimant is entitled to a work disability, his functional impairment rating is higher. The Claimant, through his own impressive efforts[,] has managed to find work as a nurse, essentially proving to the Court that he is not permanently and totally disabled. The Court notes that the Claimant likely has functional impairments that are not included in this award for his mental health impairment and his foot. The Claimant's own efforts to remain employed are a credit to his character in the opinion of the Court.²

Consequently, the Judge limited claimant's award of disability benefits to \$100,000.

Claimant contends he was permanently and totally disabled from the time of his layoff from respondent in March 2004 until he commenced working on August 21, 2007, or until he found sedentary work he could physically tolerate on October 27, 2008. Claimant further contends the maximum award for permanent total disability benefits, \$125,000, all would have been due and owing by mid-April 2007. Claimant maintains that returning to work in August 2007 (although ultimately unsuccessful) and finally in October 2008 (in a job he can physically perform) after receiving nurses' training should not preclude entitlement to permanent total disability compensation. He also notes the \$100,000 maximum awarded for permanent partial disability benefits would have been due and owing in its entirety by mid-February 2006, which was before he was able to return to work. Accordingly, claimant requests the Board to modify the April 9, 2009, Award by granting him permanent total disability benefits and increasing his disability benefits to \$125,000.

Respondent argues there is no medical or vocational expert testimony that claimant was permanently and totally disabled.

¹ The Board notes the reference to the 79.5 percent work disability in the second paragraph of the section entitled "Award" (at page 3 of the April 9, 2009, Award) instead should be a reference to a 79.5 percent whole person functional impairment.

² ALJ Award (Apr. 9, 2009) at 3.

As indicated above, the parties stipulated the only issue before the Board on this appeal is whether claimant is entitled to receive permanent total disability benefits for the period requested.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that claimant's request for permanent total disability benefits should be denied for the period he was off work and going to school to become a registered nurse.

Respondent employed claimant at its refinery in Coffeyville, Kansas. On July 10, 2001, claimant was sprayed with hydrofluoric acid on his right forearm and both thighs. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent.

The injuries caused by the acid were horrific. In addition to the immediate loss of flesh and experiencing cardiac arrest approximately 15 times, claimant developed high blood pressure, diabetes, end-stage kidney disease, anxiety, flashbacks, depression, cataracts, insomnia, fatigue, dementia, venous insufficiency and orthostatic hypotension. Claimant acquired MRSA, which seeded in his low back, from a catheter infection. Consequently, claimant underwent a laminectomy and discectomy at L4-5. Eventually claimant's L4-5 vertebrae naturally fused. Claimant, who was 46 years old at the time of his accident, is lucky to have survived.

After a three-month hospital stay and being off work for a number of weeks, claimant returned to work for respondent in an accommodated job as an assistant secretary. The record is not entirely clear when claimant returned to work, but claimant's attorney suggests it was sometime in December 2001.³ Knowing he would lose his accommodated job upon the sale of the refinery, claimant tried returning to his former duties in the refinery as an operator. And although he had significant difficulties, he performed that job for approximately two months before the refinery was sold in March 2004. Claimant testified about his difficulties, in part:

My feet were killing me. My legs were killing me. My, I was having problems with flashbacks and nightmares, not being able to sleep.⁴

³ R.H. Trans. at 20.

⁴ *Id.*, at 22.

Claimant also testified he had problems with fatigue doing that job.⁵

The medical records from Dr. P. Brent Koprivica indicate claimant returned to work for respondent on October 20 or 22, 2001, and that he worked for only two weeks in an accommodated job until returning to work for respondent in June or July 2002.

In either event claimant was working for respondent by June or July 2002 and continued working there until early March 2004.

On or about March 2, 2004, respondent sold its Coffeyville refinery and claimant was terminated the same day. Claimant sought employment elsewhere. Claimant obtained some interviews, which he felt went well until he revealed his kidney problems and then he sensed there was concern about how he might affect the potential employers' insurance.

When he could not find a job, claimant returned to school in August 2004.⁶ He continued to look for work while in school.⁷ Claimant testified he drew unemployment benefits for 18 weeks and then began receiving Social Security disability benefits.⁸

In May 2007, claimant graduated with a nursing degree from Labette Community College. And on August 21, 2007, he began working as an RN in acute care for the Coffeyville Regional Medical Center. But that job was physically demanding and claimant experienced swelling in his feet and legs, back pain, and stamina problems. Moreover, he worked 12-hour days, three days a week, and he could not do his required peritoneal dialysis on the days that he worked. In mid-March 2008, claimant was sent home a couple of nights because of his decreased mental state. Claimant eventually could not work due to symptoms (including, among others, confusion, dizziness, disorientation, and visual and auditory hallucinations) that he attributed to his inability to do dialysis.

On or about April 1, 2008, claimant awoke in the middle of the night, got up, passed out, and broke his right leg. When claimant attempted to return to work in mid-May 2008, his legs swelled and he was sent home and terminated by the medical center.

⁵ *Id.*

⁶ *Id.* at 42, 43.

⁷ *Id.*, at 43.

⁸ *Id.*, at 44.

On October 27, 2008, claimant began working for Sanctuary at the Fredonia Regional Hospital as a mental health nurse for geriatric patients. That job also requires claimant to work 12-hour days, three days a week. But it is not as physically demanding as the job at the Coffeyville medical center.

Claimant presented the testimony of Dr. Lauren T. Lee, a psychiatrist who first saw claimant in June 2008; Dr. Bradley R. Barrett, who is claimant's family physician; and Dr. P. Brent Koprivica, who examined claimant in September 2007. Dr. Koprivica recommended following permanent work restrictions; namely, limit occasional lifting or carrying to less than 40 to 50 pounds; avoid frequent or constant bending at the waist, pushing, pulling, and twisting; avoid awkward positions of the low back; limit captive sitting to no more than an hour with claimant being permitted to move around as needed; limit standing and walking to less than one hour and taking a break as needed; avoid squatting, crawling, kneeling, and climbing; and avoid sun exposure.

None of the doctors were asked whether claimant was unable to work following his job loss in early March 2004. Likewise, there is no evidence from a vocational rehabilitation expert or other vocational expert that claimant was unable to work during the period in question.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2001 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is an understatement that claimant sustained significant injury due to his July 10, 2001, accident. Moreover, this claim demonstrates how the benefits awarded under the Kansas Workers Compensation Act can be inadequate in light of the injuries sustained. Nonetheless, the fact remains claimant was capable of performing substantial and gainful employment at the refinery for more than a year and a half (at a minimum) between the July 2001 accident and his March 2004 termination. And claimant has failed to prove why he was unable to perform similar work for another employer.

In conclusion, the Board finds and concludes claimant has failed to prove he was permanently and totally disabled following his termination from respondent's employment in March 2004. Consequently, claimant's request for permanent total disability benefits should be denied.

The Judge approved the fee arrangement with Mr. Short. The administrative file, however, includes a lien for attorney fees filed by Fred Spigarelli of the Spigarelli Law Firm, which was not addressed. Accordingly, the order approving attorney fees is set aside. When attorney fees are considered, the Judge is directed to also consider the lien from the Spigarelli Law Firm.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the April 9, 2009, Award entered by Judge Klein to set aside the approval of attorney fees. When attorney fees are considered, the Judge is directed to also consider the lien from the Spigarelli Law Firm. The remainder of the Award is affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
Fred Spigarelli, Spigarelli Law Firm
Jeffrey E. King, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁹ K.S.A. 2008 Supp. 44-555c(k).